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No. 00-

IN THE

Supreme Court of the United States

JAMES D. STOUT and SHIRLEY A. BROWN,

Petitioners,

v.

J.D. BYRIDER *a/k/a* DOCHERTY MOTORS INC.;
T & J ACCEPTANCE CORPORATION,
d/b/a CARNOW ACCEPTANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

May a court compel a party to a consumer contract to submit Truth in Lending Act claims arising from the contract to arbitration when doing so will effectively preclude the consumer from both vindicating his or her statutory rights and bringing the claim on behalf of a class of others similarly situated?

May a court deny class certification of a Truth in Lending Act claim arising from common omissions contained in standardized financing documents on the basis that the class representative's claim is not "typical" of those of the class due to differences in the type and intended use of the merchandise purchased?

May a court deny class certification on the basis that the representative is not "adequate" due to the representative's prior lawsuits against the defendant, because the representative has received a settlement offer from the defendant or because the representative has made a claim under the warranty which forms the basis of her Truth in Lending Act Claim?

May a court deny class certification of a Truth in Lending Act claim on the basis that individual reliance must be demonstrated, thereby precluding a finding that common issues predominate over individual issues?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is published at 228 F 3d 709. A copy of the opinion is included in Appendix A at 1a-14a.

The opinion of the District Court for the Northern District of Ohio concerning the arbitration issue is published at 50 F. Supp. 2d 733. A copy of the opinion is included in Appendix B at 15a-31a.

The opinion of the District Court for the Northern District of Ohio concerning class certification is unpublished. A copy of the opinion is included as Appendix C at 32a-44a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its Opinion on September 8, 2000. This Petition for Writ of Certiorari is filed within 90 days of that decision, and the Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

STATUTORY PROVISIONS INVOLVED

Federal Arbitration Act, 9 U.S.C. § 2:

Validity, irrevocability and enforcement of agreements to arbitrate

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

(July 30, 1947, c. 392, 61 Stat. 670.)

Truth in Lending Act, 15 U.S.C. § 1640

Civil liability

(a) Individual or class action for damages; amount of award; factors determining amount of award.

Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part, including any requirement under section 1635 of this title, or part D or E of this subchapter with respect to any person is liable to such person in an amount equal to the sum of —

(1) any actual damage sustained by such person as a result of the failure.

STATEMENT OF THE CASE

The facts of this case raise compelling questions concerning the validity of arbitration agreements inserted in consumer "adhesion" contracts and the propriety of class certification in consumer fraud litigation.

Respondent J.D. Byrider, a.k.a. Docherty Motors, Inc. ("J.D. Byrider") is engaged in the business of selling used automobiles to consumers throughout the State of Ohio. Its marketing is directed toward individuals who have poor credit histories. Each of the automobiles it offers for sale is priced at $7,000, regardless of the make, model, age or condition of the car.

Respondent T&J Acceptance Corporation, d.b.a. CarNow Acceptance Corporation ("CNAC") provides financing to individuals who purchase automobiles from J.D. Byrider. CNAC maintains an office in each J.D. Byrider dealership, and one employee at each location is given responsibility for closing loan transactions. That employee is provided with a "deal jacket" containing a myriad of standardized forms which must by signed by the consumer in order to complete the loan transaction.

Through discovery conducted in the instant matter, Petitioners discovered that each consumer is surreptitiously videotaped while signing the loan documents.

Included among the documents presented to the consumer for signature is an arbitration agreement. Two different agreements have been used by Respondents since 1995. One, signed by Petitioner Brown, provides for arbitration through the Better Business Bureau, is silent as to which party shall bear the costs of arbitration, and provides for arbitration of all claims other than those related to the customer's failure to make timely payments under the financing agreement. Petitioner Brown's agreement is attached as Appendix D. The other, signed by Petitioner Stout, requires arbitration in accordance with the rules of the American Arbitration Association, prohibits class action claims, and requires that each party shall pay their own expenses and bear arbitration costs equally. Petitioner Stout's agreement is attached as Appendix E. Videotapes reveal that CNAC employees represented the arbitration agreement as a "free benefit", designed to protect consumers in the event Respondents attempted to raise the monthly payment above the amount specified in the loan agreement.

The loan documentation also includes a provision through which the consumer may purchase a warranty at a cost of $895. This provision is automatically generated by computer, and is presented to the consumer as a requirement that is included in the cost of financing the vehicle. The warranty is imposed upon all consumers, and, contrary to representations made at the time of sale, the cost of the warranty is financed along with the cost of the vehicle.

Petitioners James D. Stout and Shirley A. Brown purchased automobiles from J.D. Byrider in 1998. Both financed those purchases through CNAC, both signed an arbitration agreement, and both financed the warranty mandated by Respondents in addition to financing the cost of the automobile.

Petitioners brought this suit in the United States District Court for the Northern District of Ohio, puruant to 28 U.S.C. § 1331, individually and on behalf of a class of individuals who had purchased an automobile from Docherty Motors and financed that automobile through CNAC. Petitioners alleged violations of the Truth In Lending Act, 15 U.S.C. § 1601, *et seq.*, ("TILA") the Ohio Consumer Sales Practices Act, R.C. 1345.01, *et seq.* and common law fraud[1]. The district court denied Petitioner's motion for class certification as to all claims, and granted Respondent's request to compel arbitration of Petitioners' individual claims.

Petitioners appealed this ruling to the United States Court of Appeals for the Sixth Circuit. That court upheld the district court's decision, finding that the district court properly compelled arbitration and denied class certification. Specifically, the court of appeals held that, because the arbitration agreement specified the organization through which the arbitration was to be conducted, there was no danger that Petitioners would be unable to vindicate their statutory rights. The court of appeals also declined to find the agreement unconscionable.

With respect to the class certification issue, the court held that Petitioners' claims were atypical of the class and that they were inadequate representatives under Fed. Civ. R. 23(a), because their interests were antagonistic to those of the class. According to the court of appeals, this antagonism was evidenced by the fact that (1) Petitioner Stout voluntarily dismissed a related lawsuit filed against Respondents in state court (2) Petitioner Brown made a claim under the warranty at issue herein and (3) Respondents made an individual settlement offer to Petitioners at a pre-trial conference held in the district court. The court of appeals also found that Petitioners' claims for fraud and violation of TILA required proof of reliance, an element that could only be demonstrated though individual

1. Petitioners do not appeal the denial of class certification of their claims for common law fraud and violations of Ohio's Consumer Sales Practices Act.

examination of "what documents the customer reviewed and in what manner, what representations Defendants made to each customer, and whether the customer selected the extended service agreement". App. A at 14a.

REASONS FOR GRANTING THE WRIT

With respect to the arbitration issue, the facts of this case mirror those at issue in *Randolph v. Green Tree Financial Corp.*, 178 F.3d 1149 (11th Cir. 1999), *cert. granted,* 120 S. Ct. 1552 (2000). The opinion of the court of appeals below is in direct conflict with that of the Court of Appeals for the Eleventh Circuit in *Randolph*, as well as the Ohio Supreme Court's opinion in *Williams v. Aetna Financial Company*, 83 Ohio St. 3d 464 (1998), *cert. denied*, 119 S. Ct. 1357 (1999).

The arbitration provisions at issue herein are similar to those imposed upon thousands of consumers every day. Almost universally, the consumer who agrees to arbitrate has no understanding of how the agreement will impact upon his or her ability to pursue statutory claims, such as those that arise out of the seller's violation of TILA. Damages for violations of TILA tend to be very small, rendering an expensive arbitration impractical. In some cases, the potential for recovery may be so small that a class action is the only way in which a violation of the statute can be effectively both redressed and deterred.

The reported opinion of the court of appeals will preclude consumers from obtaining any meaningful remedy under TILA. In addition to requiring arbitration in situations in which it is manifestly unfair to do so, the court of appeals' opinion renders class certification of consumer-based claims effectively impossible.

The class certification issues raised herein can be found at the core of virtually every consumer class action. Petitioners have alleged that Respondents violated TILA by omitting required information in its standardized form loan agreements. As in any consumer class action, the claims of the class members

are based upon similar facts and legal theories, but arose through a series of individual transactions between Respondents and the class members. If allowed to stand, the court of appeals opinion will shift focus of class action determination away from the common facts and legal issues involved and require scrutiny of the nuances of the individual transactions through which the consumers' claims arise.

I.

An arbitration agreement which does not disclose the dollar amount of fees the consumer must pay in order to submit statutory claims to arbitration or which denies the consumer the right to bring a class action fails to provide the minimum guarantees necessary to ensure that the consumer will be able to vindicate his or her statutory rights.

The arbitration agreements at issue herein fail to protect Petitioners and other consumers with claims of limited monetary values from being exposed to exorbitant arbitration fees, fees which would discourage them from exercising their rights under TILA. An arbitration agreement which denies a consumer the right to bring a class action to pursue his or her claims has a similar chilling effect. The Sixth Circuit Court of Appeals completely disregarded the devastating effect the arbitration agreement would have upon Petitioners' ability to pursue statutory claims, and erred as a matter of law in upholding the decision of the district court.

There is no question that the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* ("FAA") reflects a policy favoring enforcement of valid agreements to arbitrate. *See Mastrobuona v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995). However, when enforcement of the agreement will result in a "prospective waiver of a party's right to pursue statutory remedies", the agreement is against public policy and void. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1995). An arbitration agreement is therefore unenforceable if it fails to provide some minimum protection

to insure that a plaintiff's ability to pursue statutory claims will not be eradicated. *Randolph*, 178 F.3d at 1158.

The court of appeals incorrectly found the minimum safeguards to be present where the arbitration agreement "clearly specif[ies] the established organization whose rules will govern the arbitration." App. A at 9a. This finding in essence begs the question — if one starts with the premise that an arbitration agreement is unenforceable when it imposes hefty filing fees so as to render pursuit of the claim impracticable, it is difficult to imagine how that situation is remedied simply by specifying the organization through which arbitration is to be conducted to a consumer who is certainly unaware of that organization's fee schedule.

The Court of Appeals for the Eleventh Circuit was absolutely correct in refusing to enforce an arbitration agreement substantially similar to the one at issue here. In *Randolph*, the court looked for the necessary "minimum guarantees" in the following:

> The arbitration clause in this case raises serious concerns with respect to filing fees, arbitrators' costs and other arbitration expenses that may curtail or bar a plaintiff's access to the arbitral forum. . . . This clause says nothing about the payment of filing fees or the apportionment of the costs of arbitration. It neither assigns an initial responsibility for filing fees or arbitrators' costs, nor provides for a waiver in cases of financial hardship. It does not say whether consumers, if they prevail, will nevertheless be saddled with fees and costs in excess of any award. It does not say whether the rules of the American Arbitration Association, which provide at least some guidelines concerning filing fees and arbitration costs, apply to the proceeding, whether some other set of rules applies, or whether the parties must negotiate their own set of rules.

Id. at 1158.

Of all these criteria, the only one present in the subject arbitration agreements is the latter. The arbitration provision signed by Petitioner Brown is completely silent as to payment of fees. The version signed by Petitioner Stout requires each party to pay their own expenses, and bear equally the arbitrator's fees. Neither agreement discloses the amount of fees that will be incurred, nor provides for a waiver of fees in case of financial hardship. Furthermore, the agreements do not insure that a consumer who obtains a relatively small award will not be required to pay fees in excess of that award.

It is apparent that an arbitration provision that merely specifies the agency through which arbitration is to be conducted but does not disclose the fees that will be incurred nor insure those fees will not exceed the award does not provide the minimum safeguards necessary to insure that a plaintiff's statutory rights will be protected.

As the court of appeals below correctly noted, one factor which a court must consider in determining whether to compel arbitration is whether Congress intended the claims to be subject to arbitration. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Despite the FAA's policy of favoring enforcement of arbitration agreements, an arbitration agreement will not be enforced where "Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Gilmer*, 500 U.S. at 26, citing *Mitsubishi Motors*, 473 U.S. at 628.

The arbitration provision signed by Petitioner Stout provides that "no class action arbitration may be ordered under this provision". Both arbitration agreements at issue herein effectively preclude maintenance of a class action by forcing consumers to conduct an arbitration of their individual claims. This consequence of the arbitration provision clearly runs afoul of the stated policy behind TILA.

The class action device is vital to those who wish to prosecute claims with the potential for small monetary recoveries. As this Court has recognized:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's . . . labor.

Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997). This policy is particularly relevant to claims under TILA, where it is clear that Congress intended class actions to be used as a device to insure voluntary compliance with the provisions of the Act.

An example of congressional intent to encourage class action litigation under TILA can be found in the 1974 amendments to the Act, in which Congress placed a cap on damages that could be awarded in class actions. The legislative history indicates that the reason for these amendments was to encourage class action litigation. The Court of Appeals for the Sixth Circuit has previously recognized that

> [t]he legislative history of the 1974 amendment reveals that Congress acted to counter the manifest judicial unwillingness to impose class liability under the Act. Indeed, it appears that Congress felt constrained to encourage class actions in the truth-in-lending context because of the apparent inadequacy of the Federal Trade Commission's enforcement resources and because of a continuing problem of minimal voluntary compliance with the Act on the part of creditors.

Watkins v. Simmons and Clark, Inc., 618 F.2d 398, 400 (6th Cir. 1980). Congressional desire to encourage class actions under

TILA will be frustrated if those claims are subject to arbitration. This principle has recently been recognized by a number of federal courts. *See, e.g., Knepp v. Credit Acceptance Corporation*, 229 B.R. 821 (N.D. Ala. 1999); *Baron v. Best Buy Co., Inc.*, 75 F. Supp. 2d 1368, 1370 (S.D. Fla. 1999); *Lozado v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087 (W.D. Mich. 2000).

II.

An arbitration provision contained in a consumer adhesion contract is against public policy and unenforceable as a matter of law.

Under the FAA, an agreement to arbitrate is enforceable except upon "such grounds as exist at law or in equity for the revocation of any contract." This Court has held that state law governing contracts is applicable to arbitration agreements if that law arose to govern issues concerning the validity, revocability or enforceability of contracts generally. *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 684 (1996). By contrast, state laws that specifically pertain to arbitration agreements are subject to pre-emption by the FAA. *Id.*

The Ohio Supreme Court has held that arbitration agreements made under circumstances similar to those present here are unconscionable and therefore unenforceable. In *Williams v. Aetna Financial Co.*, 83 Ohio St. 3d 464 (1998), *cert. denied*, 119 S. Ct. 1357 (1999), the court refused to enforce an arbitration provision contained in a consumer loan agreement where the consumer, after agreeing to contract for home improvements, was led by the contractor to a finance company that had a prior arrangement with the contractor whereby the finance company would provide high interest loans to customers of the contractor. Examining the arbitration provision in the light of R.C. § 2711.01(A), a statute identical to 9 U.S.C. § 2, the court found that principles of equity precluded enforcement of the arbitration provision.

The court of appeals below first found *Williams* inapplicable because it believed that the case was decided based upon the Ohio Arbitration Act. This finding was clearly in error. While the court cited the Ohio Arbitration Act in reaching its decision, the principles of equity upon which the court relied to find the arbitration agreement unenforceable apply to contracts generally. Therefore, pursuant to this Court's decision in *Doctor's Associate's, Inc. v. Casarotto, Williams* is applicable to this case, and demands that the arbitration agreement be found unconscionable.

As the Court of Appeals recognized, in order for a contract to be unconscionable under Ohio law, it must be one-sided, deny the less advantaged party meaningful choice in accepting the terms of the contract, and involve a situation such that the less advantaged party cannot obtain their desired product or service except by acquiescing to the form contract.

After having found *Williams* inapplicable, the Court of Appeals held that *Williams* would not preclude enforcement of this agreement. In doing so the court noted that there was no evidence that Respondents would have refused to sell the vehicles if Petitioners had refused to sign the arbitration agreements, nor any evidence that petitioners could only purchase similar vehicles by agreeing to the arbitration provision.

Contrary to the court of appeals' opinion, there was sufficient evidence from which the district court should have concluded that the agreement was unconscionable. The arbitration agreement signed by Petitioner Stout contains a clause which exempts "claims relating to repossession or replevin of the vehicle" and "claims seeking total damages under $10,000". The agreement signed by Petitioner Brown exempts claims "by the dealer that Purchaser(s) have filed to make payments on a timely basis in compliance with the contracts".

These exceptions operate to exempt from arbitration virtually all claims that J.D. Byrider may bring against its

customers. Petitioner Brown's agreement does so specifically; Petitioner Stout's does so implicitly. Claims related to "repossession or replevin" of the vehicle are likely to be those asserted by the dealer. Furthermore, a likely consequence of the $10,000 limitation is that the consumer will be foreclosed from bringing any claim pursuant to which he or she is entitled to attorney fees or punitive damages in a court of law, including claims based upon consumer protection statutes. In contrast, the only claims the dealer is likely have against the consumer are those related to nonpayment under the financing agreement, claims which, under either version of the arbitration agreement, J.D. Byrider is free to bring in court. The agreement is blatantly one-sided, and the court of appeals erred in failing to recognize this.

Moreover, the evidence below indicated that every customer, without exception, signed the arbitration agreement. This strongly indicates that Petitioners were denied meaningful choice in accepting the terms of the contract, and amply demonstrates the superior bargaining position in which J.D. Byrider placed itself. *See, e.g., Preston v. Kruezer*, 641 F. Supp. 1163, 1172 (N.D. Ill. 1986) ("In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining powers").

In relying upon a lack of any affirmative evidence demonstrating that Petitioners could not have purchased similar vehicles without agreeing to an arbitration provision, the court of appeals ignored the reality of today's marketplace, a reality which has been recognized by other federal courts:

> In today's market it is virtually impossible to purchase a new or used automobile without the sales contract containing an arbitration provision. . . . [C]onsumers are faced with an unrelenting choice today: "The reality is that these provisions appear with increasing frequency in today's marketplace. As a result, consumers find it increasingly difficult

> to acquire basic goods and services without forfeiting their rights to try before a jury the common law claims that may accrue to them. Entire segments of the market for certain goods and services, such as automobile sales and their attendant necessary financing, are being closed to consumers who are unwilling to forfeit the rights guaranteed to them by the federal and state constitutions. To sanction this market closure would essentially effect the repeal of the Seventh Amendment by the concurrence of judicial with legislative fiat."

Knepp v. Credit Acceptance Corp., 229 B.R. 82, 837-38 (N.D. Ala 1999), citing *Allstar Homes, Inc. v. Waters*, 711 So. 2d 924, 933 (Ala. 1997) (Cook, J. concurring).

The agreements at issue fall squarely within the class of contracts which are unconscionable under Ohio law. The district court erred as a matter of law in compelling arbitration under these circumstances.

III.

Civ. R. 23(a)(3)'s requirement that the representative plaintiff's claims be "typical" of those of the class is satisfied when the representative's claims arise from the same course of conduct by the defendant and are based upon the same legal theories as those of the class.

The court of appeals below upheld the district court's finding that Petitioners' claims were not typical of those of the class for purposes of Fed. Civ. R. 23(a)(3) because of differences

> between Plaintiffs and ostensible class members ranging from the type of car, the degree of repairs necessitated, the response to those repairs, the purpose for which the car was purchased, the individual circumstances and transaction surrounding each purchase including each class member's understanding of the terms and conditions

> of their purchase agreements, and the extent of injury suffered.

App. A at 12a. The court of appeals abused its discretion in reaching this conclusion.

Under Rule 23(a)(3), typicality is established if the claims of the putative class members arise from the same event, practice, or course of conduct and are based upon the same legal theories. *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468, 472 (5th Cir. 1986); *In re Revco Sec. Litig.*, 142 F.R.D. 659, 666 (N.D. Ohio 1992). "The typicality requirement is said to limit the class claims to those fairly encompassed by the named plaintiff's claims", *General Telephone Co. v. EEOC*, 466 U.S. 318, 330 (1980), and does not require that the representative's circumstances be identical to that of each class member. *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1006 (5th Cir. 1993). Rather, Rule 23(a)(3) is designed to "ensure that the claims of the representative party are similar enough to the claims of the class so that the representative adequately will represent all members of the class." *Hiatt v. County of Adams, Ohio*, 155 F.R.D. 605 (S.D. Ohio 1994).

The evidence below demonstrates that each putative class member was presented with standardized, pre-printed contract forms. The experience of each and every customer was virtually identical; the exact same forms were provided in the exact same order with an identical description of each. Differences in the model of vehicle purchased, the amount of repairs required, Respondent's "response" to those repairs or the purpose for which a particular class member purchased the vehicle have absolutely no bearing upon Petitioners' claims under TILA. The preprinted forms either evidence a violation or they do not; proof of those violations will not require evidence even remotely related to the factors enumerated by the court of appeals. Furthermore, as each class member paid the same amount for the warranty, there will be little if any difference in the "degree of injury" suffered.

IV.

A class representative is "adequate" for purposes of Civ. R. 23(a)(4) when there is no antagonism between the representative's claims and those of the class.

Similarly, the court of appeals abused its discretion when it upheld the district court's finding that Petitioners were not adequate representatives of the class under Fed. Civ. R. 23(a)(4). In reaching its decision, the court of appeals relied upon the district court's finding that (1) Petitioner Stout had filed and voluntarily dismissed a state court action against respondents; (2) Petitioner Brown received an engine replacement under the warranty at issue herein; and (3) Respondents offered to refund the purchase price of Petitioner Stout's vehicle.

A representative plaintiff meets the requirements of Rule 23(a)(4) if he or she "will fairly and adequately protect the interest of the class." Fed. Civ. R. 23(a)(4). The requirement is met as long as there is no antagonism between the representative's claims and those of the class. *Cross v. National Trust Life Ins. Co.*, 553 F.2d 1026, 1031 (6th Cir. 1977).

The district court found that "[i]nterests are antagonistic when there is evidence that the representative plaintiffs appear unable to 'vigorously prosecute the interests of the class.' " App. C at 40a, citing *In re American Medical Systems,* 75 F.3d 1069, 1083 (6th Cir. 1993).

Courts generally acknowledge that employment of competent counsel assures that the claims of absent class members will be vigorously prosecuted. *Berland v. Makc*, 48 F.R.D. 121, 127 (S.D.N.Y. 1969); *South Carolina National Bank v. Stone*, 139 F.R.D. 325, 330-331 (D. So. Carolina 1991). The district court found Petitioners' counsel to be competent. App. C at 40a.

There is no evidence in the record below that the named Plaintiffs are unable to vigorously prosecute the interests of the class. In his state court action, Petitioner Stout did not assert a

TILA claim. There is absolutely no basis in the record for finding that lawsuit, which was dismissed prior to the filing of the instant matter, created a conflict of interest. Likewise, the fact that Petitioner Brown received an engine replacement under the warranty has no bearing upon her ability to prosecute a TILA claim on behalf of the class.

More troubling is the fact that the court of appeals relied upon a settlement offer received by Petitioner Stout at a pre-trial hearing as evidence that he was an inadequate representative. If this reasoning is accepted, virtually any defendant can defeat class certification by making an unsolicited settlement offer to the named Plaintiff.

In sum, there is simply no evidence in the record that Petitioners are unable to vigorously prosecute this action on behalf of the class, and the court of appeals abused its discretion in finding to the contrary.

V.

A finding that common issues predominate over issues effecting only individual class members cannot be precluded simply on the basis that the claims of the class arose through a series of individual transactions between class members and the defendant.

The court of appeals agreed with the district court that "the factual core of the case was whether each putative class member relied upon false representations or failures to disclose, and if so, what damages were proximately caused by that reliance." App. A. at 14a. For this reason, the court of appeals held that Petitioners' claims failed to meet Civ. R. 23(b)'s predominance requirement.

The court of appeals erred as a matter of law in holding that reliance is an element of a TILA claim. Moreover, even if Petitioners were required to demonstrate reliance in order to succeed on their TILA claims, that reliance may be easily demonstrated on a class-wide basis by allowing reliance to be inferred.

Civ. R. 23(b)(3) requires a finding that questions of law or fact common to class members "predominate" over those affecting only individual members. "Predominance is usually decided on the question of liability, 'and if the liability issue is common to the class, common questions are held to predominate over individual questions.' " *In re Revco Securities Litig.*, 142 F.R.D. at 662, quoting *Fry v. UAL Corp.*, 136 F.R.D. 626, 637 (N.D. Ill. 1991). This is particularly true when the focus of a plaintiffs' proof is based upon the conduct of the defendant, or where the claims arise from standardized documents. *Peterson v. H&R Block Tax Services, Inc.*, 174 F.R.D. 78 (N.D. Ill. 1997).

In order to succeed on their TILA claim, Petitioners must demonstrate that (1) Respondents were required by TILA to disclose that the cost of the warranty is a part of the "finance charge" associated with the credit transaction (2) Respondents failed to make this disclosure; and (3) Petitioners incurred damages as a result of Respondents' violation of the statute. The first element will be resolved as a matter of law; the second will be demonstrated through the standardized loan documentation.

The third element is easily demonstrated[2]. "[P]roof by the consumer . . . that the lender materially understated the applicable finance charge entitles the consumer to actual damages measured by the amount of the undisclosed finance charges, without requiring the consumer to further prove her detrimental reliance on the disclosure statement." *Russell v. Fidelity Consumer Discount Company*, 72 B.R. 855 (E.D. Pa. 1987). A number of federal courts are in agreement that there is no requirement that a plaintiff demonstrate reliance in order to succeed upon a TILA claim. *Jones v. Bill Heard Chevrolet, Inc.*, 212 F.3d 1356, 1363 (11th Cir. 2000) ("The basis of TILA liability is . . . failure to disclose information required to be

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2. TILA provides for both "actual" and "statutory" damages. Pursuant to 15 U.S.C. § 1640, statutory damages are not available in a class action.

disclosed; there is no requirement that" plaintiff demonstrate reliance. (quoting *Charles v. Krauss Co.*, 572 F.2d 544, 546 (5th Cir. 1978)); *Aidel v. Chase Federal Sav. & Loan Assoc.*, 630 F. Supp. 131 (S.D. Fla. 1986), *aff'd*, 810 F.2d 1051 (11th Cir. 1987)). In this case, the cost of the warranty and the term of the financing agreement are the same for each and every class member.

Petitioners can thus prove the necessary elements of their TILA claim by reference to both Respondents' uniform conduct and the standardized forms given to each class member. Individual issues, if any, will be minimal.

Those courts which have required proof of reliance in order to recover actual damages under the statute have required that the plaintiff demonstrate that had the disclosure statement been accurate, he or she would have sought, and obtained, a lower price. *See, e.g., Peters v. Jim Lupient Oldsmobile*, 220 F.3d 915 (8th Cir. 2000). This requirement is often cited by defendants intent upon defeating class certification, despite the statute's clear preference for class actions.

However, even if it is accepted that Petitioners must prove reliance in order to recover actual damages, this proof can be made on a class-wide basis by inferring reliance on the omission from the fact that class members entered into the transaction. This Court has previously recognized this method of demonstrating reliance in the securities context, *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972). A number of state courts faced with the issue in consumer fraud class actions have reached the same conclusion. *See, e.g., Vasquez v. Superior Court*, 4 Cal. 3d 800 (1971); *Collins v. Rocha*, 7 Cal. 3d 232 (1972); *Occidental Land, Inc. v. Superior Court*, 18 Cal. 3d 355 (1976); *Wilmer v. Sunset Life Ins. Co.*, 78 Cal. App. 4th (2000); *Skalbania v. Simmons*, 443 N.E. 2d 352 (Indiana 1982); *Varacallo v. Massachusetts Mutual Life Ins. Co.*, 332 N.J. Super. 31 (2000); *Stellema v. Vantage Press, Inc.*, 492 N.Y.S. 2d 390 (N.Y. App. 1985); *Ackerman v. Price Waterhouse*, 683 N.Y.S.

2d 179 (N.Y. App. 1998); *Adams v. Little Mo. Materials Ass'n.*, 143 N.W. 2d 659 (N.D. 1966); *Cope v. Metropolitan Life Ins. Co.*, 82 Ohio St. 3d 426 (1998); *Baughmann v. State Farm Mut. Auto Ins. Co.*, 88 Ohio St. 3d 480 (2000); *Pickett v. Holland America Line - Westours, Inc.*, 100 Wn. App. 901 (2000).

In *Affiliated Ute Citizens*, this Court permitted plaintiffs in a securities fraud action brought pursuant to Rule 10b-5 (17 C.F.R. 240.10b5) to demonstrate reliance on omissions by inference. The Court stated:

> Under the circumstances of this case, involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision. . . . This obligation to disclose an this withholding of a material fact establish the requisite element of causation in fact.

Id. at 154.

The reasons for permitting reliance to be proven by inference in the securities context are just as valid for allowing it to be so proven in a TILA action. Both the Securities Exchange Act and TILA are designed to guard against a failure to disclose information material to a financial transaction. In both contexts, it is reasonable to assume that the information was withheld for the very reason that it was material to the transaction, and, had the consumer been aware of the information withheld, he or she would not have entered into the transaction.

This principle was recognized by the Sixth Circuit in *Michaels Building Co. v. Ameritrust Co., N.A.*, 848 F.2d 674 (6th Cir. 1988), when the court permitted an individual

plaintiff to prove reliance via inference in connection with fraud claim resulting from a loan transaction. The court therein stated:

> Noting that reliance is an essential element of a claim of fraud . . . [d]efendants . . . urge that plaintiffs did not rely on the alleged misrepresentations of defendants since plaintiffs testified that they did not "shop around" for a lower interest rate. We find this argument to be without merit . . . [S]ince plaintiffs knew that defendants' loan statements offered a certain prime rate (which allegedly misstated the true prime rate), this information, it must be inferred, influenced plaintiffs' decision to borrow money from those defendant banks.

The Ohio Supreme Court has also adopted this method of proof for common law fraud claims based upon omissions. In *Cope*, the court permitted reliance upon what were alleged to be common omissions contained in standardized form documents to be demonstrated by inference. In doing so, the court recognized that when it is proven that a defendant was required to disclose information in a standardized form document and failed to do so, an inference or presumption of reliance will arise as to the entire class. *Cope*, 82 Ohio St.3d at 436. (citing *Davis v. Southern Bell Tel. & Tel.*, 158 F.R.D. 173, 176-77 (S.D. Fla. 1994); *Murray v. Sevier*, 156 F.R.D. 235, 249, n.11 (D. Kan. 1994); *Heastie v. Community Bank of Greater Peoria*, 125 F.R.D. 669, 678 (N.D. Ill. 1989).

The need to demonstrate reliance should not preclude a finding that common issues predominate over individual issues.

CONCLUSION

The court of appeals' opinion will have a devastating effect upon consumers who wish to litigate statutory claims through a class action. The arbitration agreement at issue herein was thrust upon a group of people who likely had no understanding of its implications, and who certainly had no knowledge that arbitration is a far more expensive undertaking than pursuing claims in a judicial forum. In addition, if the court of appeals decision is upheld, class certification of TILA claims will become a thing of the past.

The court of appeals' opinion on class certification has implications that extend beyond TILA claims. The opinion will render class certification impossible in any consumer action brought upon a claim which requires proof of reliance. That result is simply untenable.

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED AND FILED SEPTEMBER 8, 2000, AS CORRECTED OCTOBER 26, 2000

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 99-3854

JAMES D. STOUT; SHIRLEY A. BROWN,

Plaintiffs-Appellants,

v.

J.D. BYRIDER, a/k/a Docherty Motors, Inc.; T & J ACCEPTANCE CORPORATION, d/b/a Carnow Acceptance Company,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Ohio at Akron.
No. 98-02830 — James S. Gwin, District Judge.

Argued: June 23, 2000

Decided and Filed: September 8, 2000

Before: SILER and CLAY, Circuit Judges;
STAFFORD, District Judge.*

* * *

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* The Honorable William Stafford, Senior United States District Judge for the Northern District of Florida, sitting by designation.

Appendix A

OPINION

CLAY, Circuit Judge. Plaintiffs James D. Stout and Shirley A. Brown appeal the denial of their motion for class certification and dismissal of this action for fraud and violations of the Ohio Consumer Sales Practices Act and the federal Truth in Lending Act arising from Plaintiffs' purchases of used motor vehicles from Defendants J.D. Byrider, a.k.a. Docherty Motors, Inc., and T & J Acceptance Corporation. For the following reasons, we **AFFIRM**.

I.

Docherty Motors is a closely held Ohio corporation which has sold used motor vehicles since 1995, and which advertises itself as providing financing to consumers with imperfect credit records. The corporation owns three J.D. Byrider franchises in northern Ohio. Each franchise has a manager who reports to Docherty Motors' executive vice-president.

Each franchise has a service department which performs repairs only on vehicles purchased at J.D. Byrider; the service department does both warranty and nonwarranty work. Prior to sale, each vehicle is inspected by Docherty Motors employees who perform a "safety check;" Docherty Motors also permits customers to take vehicles for a pre-purchase inspection at a mechanic of their choice.

Docherty Motors offers financing through T & J Acceptance Corporation to those individuals who may not

qualify for traditional financing such as banks or credit unions. T & J owns three CarNow Acceptance Corporation ("CNAC") franchises, located at each J.D. Byrider dealership. CNAC provides standardized guidelines for the procedure for closing a sale and loan. Byrider personnel are trained to handle sales and financing transactions in a uniform manner. A CNAC representative handles the closing on each customer's purchase, which includes individual presentation of a power of attorney for vehicle registration and license, federal odometer statement, Ohio temporary registration application, Best Extended Service Agreement (if applicable), Buyer's Order, Retail Installment Contract and Security Agreement, insurance responsibility form, Buyer's guide, check list, and customer survey questionnaire. Closings at the Sandusky dealership are videotaped by a wall mounted camera for training and quality assurance purposes. The CNAC representative provides a brief explanation of each document, answers questions about the documents, and gives buyers an opportunity to review the paperwork prior to signing. After late 1997, customers were also presented with arbitration agreements which are separate, written agreements in normal and bold-faced type.

Vehicles purchased at Docherty Motors come with a limited warranty for three months or 3,000 miles. Customers may purchase an extended service agreement which covers the same items as the limited warranty, or they may decline it. There is no financial incentive for Defendants' employees if a customer purchases an extended service agreement. The extended service agreement is presented at the same time as the other documents as part of closing.

Appendix A

The videotapes of Plaintiffs' transactions show that the documents were individually presented to Plaintiffs for their review and signature. The CNAC representative provided a hypothetical example to Stout of how the arbitration agreement might work. Brown also reviewed the arbitration agreement prior to signing. Under Brown's agreement, the only dispute not subject to arbitration is a claim by Defendants that she failed to make payments on a timely basis in compliance with the contracts; her arbitration is to be conducted through the Better Business Bureau. Under Stout's agreement, the only claims not subject to arbitration are claims under $10,000, and claims relating to repossession and replevin of the vehicle; his arbitration is to be conducted through the American Arbitration Association. Both Plaintiffs purchased extended service agreements lasting eighteen months or 18,000 miles for $895. Brown utilized the extended service agreement for replacing the engine in a car she had purchased.

On December 7, 1998, Plaintiffs James D. Stout and Shirley A. Brown, individually and on behalf of all similarly situated individuals, filed a class action complaint in the United States District Court for the Northern District of Ohio against J.D. Byrider, a.k.a. Docherty Motors, Inc., and T & J Acceptance Corporations, d.b.a. CarNow Acceptance Company. The complaint alleged violations of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601, the Ohio Consumer Sales Practices Act ("OCSPA"), Ohio Rev. Code § 1345.01, and common law fraud.

Defendants moved to strike the class action allegations, to stay the proceedings and to compel arbitration under the

parties' arbitration agreement. Plaintiffs moved to certify the proposed class. The district court denied Plaintiffs' motion for class certification, holding that Plaintiffs' claims were not typical of the putative class, that insufficient commonality existed amongst the putative class members, and that Plaintiffs were inadequate representatives for the class.

Defendants moved for summary judgment on all of Plaintiffs' claims; Plaintiffs moved for partial summary judgment on their TILA claim. The district court denied Defendants' motion to stay the proceedings but granted Defendants' motion to compel arbitration, holding after review of the record including the videotape of Plaintiffs' transactions, that the arbitration agreements were enforceable under Ohio and federal law and dismissing Plaintiffs' amended complaint "without prejudice to reinstatement should further proceedings be needed after arbitration." The district court did not rule on either party's motion for summary judgment.

Plaintiffs appealed to this Court.

II.

This Court reviews the ruling of the district court compelling arbitration *de novo*. *See Ferro Corp. v. Garrison Indus.*, 142 F.3d 926, 931 (6th Cir. 1998).

Under the Federal Arbitration Act, 9 U.S.C. § 2, ("FAA"), a written agreement to arbitrate disputes which arises out of a contract involving transactions in interstate

commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The FAA was designed to override judicial reluctance to enforce arbitration agreements, to relieve court congestion, and to provide parties with a speedier and less costly alternative to litigation. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270, 280 (1995); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 52-54 (1995). When asked by a party to compel arbitration under a contract, a federal court must determine whether the parties agreed to arbitrate the dispute at issue. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). Claims relating to fraud in the making of the arbitration agreement are determined by the court. *See C.B.S. Employees Federal Credit Union v. Donaldson, Lufkin and Jenrette Sec. Corp.*, 912 F.2d 1563, 1566 (6th Cir. 1990). Courts are to examine the language of the contract in light of the strong federal policy in favor of arbitration. *See Soler Chrysler- Plymouth*, 473 U.S. at 626; *Arnold v. Arnold*, 920 F.2d 1269, 1281 (6th Cir. 1990). Likewise, any ambiguities in the contract or doubts as to the parties' intentions should be resolved in favor of arbitration. *See Soler Chrysler-Plymouth*, 473 U.S. at 626.

When considering a motion to stay proceedings and compel arbitration under the Act, a court has four tasks: first, it must determine whether the parties agreed to arbitrate; second, it must determine the scope of that agreement; third, if federal statutory claims are asserted, it must consider whether Congress intended those claims to be nonarbitrable; and fourth, if the court concludes that some, but not all, of the claims in the action are subject to arbitration, it must

determine whether to stay the remainder of the proceedings pending arbitration. *See Compuserve, Inc. v. Vigny Int'l Finance, Ltd.*, 760 F.Supp. 1273, 1278 (S.D.Ohio 1990).

Plaintiffs argue that the district court incorrectly found that the parties had agreed to arbitrate the dispute and that under the FAA, Congress intended Plaintiffs to arbitrate their claims. Plaintiffs first contend that there was no agreement to arbitrate. However, the record indicates that the parties did agree to arbitrate: the videotape shows Plaintiffs reviewing the documents, engaging in discussions concerning them, and reading them prior to signing. "One who signs a contract is presumed to know its contents, and . . . if he has had an opportunity to read the contract which he signs he is bound by its provisions." *Sears, Roebuck & Co. v. Lea*, 198 F.2d 1012, 1015 (6th Cir. 1952). This Court applies "the cardinal rule that, in the absence of fraud or wilful deceit, one who signs a contract which he has had an opportunity to read and understand, is bound by its provisions." *Allied Steel and Conveyers, Inc. v. Fort Motor Co.*, 277 F.2d 907, 913 (6th Cir. 1960). Plaintiffs seem to argue that there is fraud in the transaction, but point to no actual evidence that either they were deceived into signing something they believed to be other than an agreement to arbitrate, or that they had not in fact signed the arbitration agreement. Absent any evidence contrary to that evident in the record — that the arbitration agreements were set forth in separate documents in regular and bold-print type, that Plaintiffs read and reviewed the arbitration agreements, that Plaintiffs had an opportunity to ask the CNAC representative about the agreements but did not do so, and that Plaintiffs

signed the agreements — we find that Plaintiffs clearly agreed to resolve their disputes through binding arbitration.

Plaintiffs also argue that Congress did not intend Plaintiffs to arbitrate the claims raised against Defendants, arguing that the Truth in Lending Act is a remedial consumer protection statute which would be usurped by imposing a requirement for arbitration.

It is settled authority that doubt regarding the applicability of an arbitration clause should be resolved in favor of arbitration. *See, e.g., Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25 (1983); *Ferro*, 142 F.3d at 932. If parties contract to resolve their disputes in arbitration rather than in the courts, a party may not renege on that contract absent the most extreme circumstances. *See Southland Corp. v. Keating*, 465 U.S. 1, 24 (1984); *Dean Witter Reynolds, Inc. v. McCoy*, 995 F.2d 649 (6th Cir. 1993). A district court's duty to enforce an arbitration agreement under the FAA is not diminished when a party bound by the agreement raises claims arising from statutory rights. *See Shearson/American Express v. McMahon*, 482 U.S. 282 (1987) (RICO); *Dorsey v. H.C.P. Sales, Inc.*, 46 F.Supp.2d 804, 808 n.5 (N.D.Ill. 1999) (TILA); *Goodwin v. Ford Motor Credit Co.*, 970 F.Supp. 1007 (M.D.Ala. 1997) (TILA). Plaintiffs cite the Eleventh Circuit Court of Appeals case of *Randolph v. Green Tree Financial Corporation*, 178 F.3d 1149 (11th Cir. 1999), *cert. granted*, 120 S. Ct. 1552 (2000), which the Supreme Court has recently granted *certiorari* to consider, in support of their argument. In *Randolph*, the Eleventh Circuit determined that an arbitration agreement "fail[ed] to provide the minimum guarantees required to

ensure that [the plaintiff's] ability to vindicate her statutory rights will not be undone by steep filing fees, steep arbitrators' fees, or other high costs of arbitration." 178 F.3d at 1158. Defendants argue, not without merit, that *Randolph* is distinguishable from this case in that *Randolph* involved a showing that the arbitration provided in those agreements was an ineffective and inaccessible forum with the potential for substantively unfair arbitration fees or procedures. In this case, the arbitration agreements clearly specify the established organization whose rules will govern the arbitration. We find Defendants' argument on this point persuasive.

Plaintiffs also argue that the arbitration agreements are unconscionable and unenforceable as against Ohio public policy. But this Court and the Supreme Court have disagreed, seeing "nothing in the act indicat[ing] that the broad principle of enforceability is subject to any additional limitations of state law." *Ferro Corp.*, 142 F.3d at 932 (*citing Southland Corp.*, 465 U.S. at 10-11). The FAA governs all aspects of arbitration procedure and preempts inconsistent state law. *See Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996); *Moses H. Cone*, 460 U.S. at 24.

In this case, Plaintiffs' claim for fraud, violations of OCSPA, and TILA relate to the purchase of their vehicles and arise under their purchase and finance contracts with Defendants. Because we previously found that the parties fairly agreed to arbitrate these types of claims, we find that neither this Court nor the Ohio courts have the ability to mandate judicial resolution of these disputes in violation of

the parties' agreement.[1] Plaintiffs point to the Ohio Supreme Court decision of *Williams v. Aetna Financial Company*, 700 N.E.2d 859 (Ohio 1998), *cert. denied*, 119 S. Ct. 1357 (1999), in support of their argument. However, we note that *Williams* considers Ohio's obligation to compel arbitration under the Ohio Arbitration Act, Ohio Rev. Code Ann. § 2711.01 (Anderson 1999), and not under the FAA as in this case. Even if *Williams* was relevant, we find it distinguishable, as Plaintiffs have not established that these agreements, like those in *Williams*, are unenforceable adhesion contracts. Under Ohio law, in order for an arbitration provision to be unconscionable, it must be one-sided, deny the less advantaged party meaningful choice in accepting the terms of the contract, and involve a situation such that the less advantaged party cannot obtain their desired product or services except by acquiescing to the form contract. *See Williams*, 700 N.E.2d at 872-73 (Cook, J. dissenting). Plaintiffs have presented no evidence beyond their speculations that Defendants would have refused to sell the vehicles had they refused to sign the arbitration agreements, nor do they demonstrate that they could only purchase similar vehicles by agreeing to the arbitration agreements. Furthermore, the district court found, and we agree, that the arbitration provisions are not so one-sided as to be unconscionable: no evidence shows that the legitimate arbitration organizations will fail to fairly and equally oversee Plaintiffs' claims. In the absence of any factual evidence that these agreements were entered into fraudulently

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1. We note that Plaintiffs are not asserting that their claims fall under the exceptions from arbitration determined by the language of the arbitration agreement itself.

or mistakenly, and absent any showing by Plaintiffs that the arbitration arrangements are themselves one-sided or unfair, we affirm.

III.

We turn to the issue of the district court's denial of class certification. We note first that as we have found that the district court correctly compelled arbitration, this issue is relevant only to the extent that it may be asserted in arbitration as a basis for damages or attorneys' fees.

This Court reviews a district court's ruling on class certification for an abuse of discretion, as the district court retains broad discretion in determining whether an action should be certified as a class action. *See Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1198 (6th Cir. 1988).

Under governing law, a court may certify a class if it performs "rigorous analysis" of the requirements of Federal Rule of Civil Procedure 23. *General Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982); *accord Sprague v. General Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998). Rule 23(a) sets forth four prerequisites to class certification: (1) the class must be so numerous that "joinder of all members is impracticable;" (2) there must be "questions of law or fact common to the class;" (3) the claims of the representative party must be "typical" of the class; and (4) the representative party must be able to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). Rule 23(b) requires that the court find that common questions of law or fact predominate over individual issues in the case.

Appendix A

Plaintiffs seek to certify a class comprising all persons who purchased an automobile from Docherty Motors that was financed by CNAC between 1993 and the present. They allege that Defendants defrauded every member of this class by selling them used vehicles with concealed damage and that every member has incurred substantial repair costs in order to remedy that damage.

The district court found that Plaintiffs' claims were not typical of the class under Rule 23(a)(3); that Plaintiffs were not adequate representatives of the proposed class under Rule 23(a)(4); and that neither Stout nor Brown showed a sufficient relationship between their experiences and the experiences of putative class members. Rule 23(a)(3) typicality "determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct." *Sprague*, 133 F.3d at 399. This Court has summarized this standard: "[a]s goes the claim of the named plaintiff, so go the claims of the class." *Id.*

We find that the district court did not abuse its discretion in its finding, noting that the district court identified discrepancies between Plaintiffs and the ostensible class members ranging from the type of car, the degree of repairs necessitated, the response to those repairs, the purpose for which the car was purchased, the individual circumstances and transactions surrounding each purchase including each class member's understanding of the terms and conditions of their purchase agreements, and the extent of the injury suffered. Because Plaintiffs' claims rest on their

understanding of the purchasing transaction and each buyer's understanding of the terms, and because some buyers did not purchase the extended service agreement, we find that the district court did not abuse its discretion. *See Peters v. Cars to Go*, 184 F.R.D. 270 (W.D.Mich. 1998) (finding under similar facts that a customer's individual decision to purchase an extended service agreement militates against class certification).

Similarly, we agree that the district court did not abuse its discretion in determining that Plaintiffs are not adequate representatives of the putative class. *See* Fed. R. Civ. P. 23(a)(4). Under Rule 23(a)(4), a plaintiff seeking to represent the class must demonstrate that he or she will fairly and adequately represent and protect the interests of the class. *See In re American Med. Sys., Inc.*, 75 F.3d 1069, 1083 (6th Cir. 1996). The court reviews the adequacy of class representation to determine whether class counsel are qualified, experienced and generally able to conduct the litigation, and to consider whether the class members have interests that are not antagonistic to one another. *See id.* Interests are antagonistic when there is evidence that the representative plaintiffs appear unable to "vigorously prosecute the interests of the class." *Id.* The district court determined that Stout and Brown had interests antagonistic to the remainder of the putative class because Stout had already filed and voluntarily dismissed a separate individual action in state court against the same Defendants, thus preserving his right to pursue that suit should the class action claim be dismissed; the named Plaintiffs obtained repairs or alternative proposed resolutions from Defendants which differ from other class members — Brown received a

complete engine replacement, and Defendants offered to fully refund to Stout the purchase price of his vehicle; and the named Plaintiffs' claims arise from different transactions and alleged injury, therefore causing absent class members to potentially lose the benefit of having the facts of their separate cases adequately presented. We find that the district court's decision, based on these considerations, not to constitute an abuse of its discretion.

We similarly agree with the district court's conclusion that Plaintiffs failed to meet the requirement of Rule 23(b) that common issues predominate over individual issues. *See* Fed. R. Civ. P. 23(b). In this case, the district court determined that the factual core of the case was whether each putative class member relied upon false representations or failures to disclose, and if so, what damages were proximately caused by that reliance. We find that this determination did not constitute an abuse of discretion by the district court in light of the fact that any resolution of the fraud or the TILA claims requires an individual assessment of what documents the customer reviewed and in what manner, what representations Defendants made to each customer, and whether the customer selected the extended service agreement. *See Castano v. American Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996) ("[A] fraud class action cannot be certified when individual reliance will be an issue.").

As we find that the district court correctly compelled arbitration and that the district court's refusal to certify a class did not constitute an abuse of discretion, we **AFFIRM** the orders of the district court.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION DATED AND FILED JUNE 9, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 5:98-CV-2830
Judge James S. Gwin

JAMES D. STOUT, et al.,

Plaintiffs,

v.

J.D. BYRIDER, et al.,

Defendants.

ORDER

In this case, Plaintiffs James D. Stout and Shirley A. Brown make claim for fraud, violations of Ohio's Consumer Sales Practices Act, and the federal Truth-in-Lending Act arising from the plaintiffs' purchase of used motor vehicles. Now before the Court is the defendants' motion to compel arbitration pursuant to 9 U.S.C. § 1, *et seq.*, the Federal Arbitration Act [Doc. 8].[1]

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1. On June 7, 1999, this Court denied the plaintiffs' motion to certify this case as a class action under Federal Rule of Civil Procedure 23.

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With their motion, the defendants say Plaintiffs Stout and Brown agreed to arbitrate disputes against the defendants relating to the sale and financing of automobiles. Defendants ask the Court to enforce the arbitration agreements and refer this case to arbitration.

Plaintiffs Stout and Brown oppose arbitration arguing that the defendants fraudulently induced their assent to the arbitration and dispute resolution agreements. Plaintiffs say that because the agreements are one-sided and benefit only the defendants, the agreements are unenforceable adhesion contracts.

Because the defendants gave plaintiffs an opportunity to ask questions and review the agreements before signing them, the Court finds that the arbitration agreements are enforceable. Therefore, the Court grants the defendants' motion to compel arbitration under the terms of the agreements. As arbitration will resolve the issues in suit, the Court dismisses this case without prejudice to reinstatement should further proceedings be needed after arbitration.

I. Factual background

In 1998, Plaintiffs James D. Stout and Shirley Brown purchased used automobiles from Docherty Motors in Sandusky, Ohio. They obtained financing to purchase the cars from Defendant CarNow Acceptance Corporation ("CNAC").

Plaintiffs Stout and Brown say the vehicles they purchased from Defendant Byrider were defective. Stout and

Brown claim they purchased expensive warranties without knowledge that these warranty charges were included in the finance charges. The plaintiffs say the defendants have engaged in a standard practice of uniformly misrepresenting the quality and value of the vehicles they sell and the cost and value of warranties.

Plaintiffs Stout and Brown also claim that with their purchase contracts, the defendants required them to sign standard form arbitration agreements. The plaintiffs now oppose arbitration under these contracts. They say the defendants did not explain the legal consequences of agreeing to arbitrate disputes relating to the sale and financing of the automobiles. Plaintiffs urge the Court not to compel arbitration because the arbitration agreements unjustly abrogate their legal rights to bring claims in court.

Considering these facts, the Court decides whether to order arbitration pursuant to 9 U.S.C. § 1, *et seq.*

II. Discussion

In this case, the parties dispute whether certain standard arbitration agreements the plaintiffs signed are enforceable. Defendants maintain the agreements are enforceable because the plaintiffs had time to review the agreements and ask questions before signing the contract. Plaintiffs say the defendants failed to fully explain the arbitration agreements. Because this case concerns arbitration agreements involving transactions in interstate commerce, the Federal Arbitration Act governs.

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The Federal Arbitration Act embodies "the strong federal policy in favor of enforcing arbitration agreements." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). The policy supporting the Act is to "ensure judicial enforcement of privately made agreements to arbitrate." *Dean Witter* at 219; *Ferro Corp. v. Garrison Indus., Inc.*, 142 F.3d 926, 932 (6th Cir. 1998).

Section 2 of the Federal Arbitration Act provides that written agreements to arbitrate in a contract involving transactions in interstate commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Section 3 provides for a stay of proceedings in district courts when an issue is determined to be arbitrable.[2] 9 U.S.C. § 3. Section 4 gives district courts authority to compel arbitration when a party neglects or refuses to comply with an arbitration agreement. 9 U.S.C. § 4.

Where the Act applies, federal law and not state law generally governs the arbitrability of a dispute. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24

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2. Courts may dismiss cases subject to reinstatement where there "is nothing left for the district court to do but execute judgment." *Arnold v. Arnold Corp. – Printed Communications for Business*, 920 F.2d 1269, 1275-78 (6th Cir. 1990); *see also Raiola v. Union Bank of Switzerland, LLC*, No. 98 Civ. 5031 (SAS), slip op., 1999 WL 262284, *7 (S.D.N.Y. April 30, 1999) (dismissing without prejudice to reinstatement subject to need for proceedings following arbitration).; *Rand v. J.C. Bradford & Co.*, No. 98 Civ. 4906 (DLC), 1998 WL 872421 (S.D.N.Y. Dec. 15, 1998) (same).

(1983). However, because arbitration is a matter of contract, a party cannot be compelled to arbitrate any claims he or she did not agree to arbitrate when making the contract. *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) ("[A]s with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability.").

If a party opposing arbitration shows "well supported claims that the agreement to arbitrate itself resulted from fraud, 'overwhelming economic power,' or unfair pressure under principles of contract, the court may revoke the contract." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 (1967) ("[T]he federal court is instructed to order arbitration to proceed once it is satisfied that 'the making of the agreement for arbitration or the failure to comply (with the arbitration agreement) is not in issue'.") (citation omitted).[3]

Here, Plaintiffs Stout and Brown each entered private contracts with the defendants. Plaintiffs now say the defendants fraudulently induced them into signing these

3. *See also Rhode v. E & T Investments, Inc.*, 6 F. Supp.2d 1322, 1326-27 (M.D. Ala. 1998) (same) (citations omitted); *Management Recruiters Int'l, Inc. v. Nebel*, 765 F. Supp. 419, 420 (N.D. Ohio 1991) ("A claim that the contract containing the arbitration clause was induced by fraud does not defeat a motion to compel arbitration unless the claimant can demonstrate specifically that the arbitration clause itself was fraudulently induced.").

contracts. Plaintiffs ask the Court to find the arbitration contracts adhesive and unconscionable.

In deciding whether to order arbitration, courts consider four principal issues: (1) whether the parties agreed to arbitrate the dispute; (2) the scope of the arbitration agreement; (3) if federal claims are asserted, whether Congress intended arbitration to govern the claims, and (4) if only some claims are arbitrable, whether to stay the proceedings pending arbitration. *H & M Charters, Inc. v. Reed*, 757 F. Supp. 859, 864 (S.D. Ohio 1991) (quoting *Creative Securities Corp. v. Bear Stearns & Co.*, 671 F. Supp. 961 (S.D.N.Y. 1966); *Compuserve, Inc. v. Vigny Int'l Finance, Ltd.*, 760 F. Supp. 1273, 1278 (S.D. Ohio 1990).

Applying these standards, the Court first decides whether the parties agreed to arbitrate their disputes. The record evidence shows that the parties did agree to arbitration.

First, the plaintiffs each engaged in lengthy discussions with Mr. Wendall Gaddie, Defendant CNAC's financing representative. These discussions involved Mr. Gaddie explaining many standard form agreements relating to the purchase of the vehicles. With each plaintiffs' automobile purchase, Gaddie sat with the plaintiff and individually presented the plaintiff with each form for review and signature. Gaddie also encouraged the plaintiffs to ask questions if they did not understand the forms.

Although the financing process appears to use prepared forms and organized transaction "jackets," each customer financing transaction is very systematic. Mr. Gaddie

systematically presents the customer with individual forms to sign and he provides a brief explanation of the form. If a customer asks a question, Mr. Gaddie answers the inquiry and gives further explanation. During the plaintiffs' meetings with Gaddie, each plaintiff specifically reviewed the arbitration agreements at issue, but did not ask questions.[4] Also, each plaintiff signed the arbitration forms, representing that they understood the terms of the agreement. These facts show that the plaintiffs agreed to arbitration.[5]

Second, both Plaintiffs Stout and Brown say they read the contract language before signing the agreements. The contract language itself is clear. On January 31, 1998, Plaintiff Brown purchased and financed a 1991 Ford Fiesta. In doing so, she read and signed a form captioned "Agreement for Binding Arbitration." The agreement states in part:

> Except as described below, in the event of a dispute under the terms of the Contracts, the Dealer and the Purchaser(s) hereby agree to submit such dispute to the *Better Business Bureau* for resolution by binding arbitration according to the rules of the Better Business Bureau.

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4. See Videotape of customer transactions, Defendants' Exhibit C.

5. *See Ferro Corp. v. Garrison Indus., Inc.*, 142 F.3d 926, 933 (6th Cir. 1998) (stating that "the issue of fraudulent inducement of a contract is to be decided by an arbitrator, unless the making of the arbitration agreement itself was fraudulently induced.").

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> THE PARTIES HEREBY FURTHER AGREE THAT THE ONLY CLAIM NOT SUBJECT TO THIS AGREEMENT IS A CLAIM BY THE DEALER THAT PURCHASER(S) HAVE FAILED TO MAKE PAYMENTS ON A TIMELY BASIS IN COMPLIANCE WITH THE CONTRACTS, SUCH A CLAIM MAY BE PURSUED IN A COURT OF LAW.

Agreement for Binding Arbitration, dated January 31, 1998 (emphasis added).

The contract language clearly says that disputes between the "Dealer" and "Purchaser" will be resolved through arbitration before the Better Business Bureau. The contract says the only exception to this agreement to arbitrate is the Dealer's right to pursue default claims in court. Taken together, the terms infer that a purchaser cannot bring claims in court.

Private arbitration offers potential real benefits to both parties in cost effective and quick resolution of disputes that may arise. The plaintiffs make no showing that arbitration before the Better Business Bureau is unconscionable. The defendants disclosed these conditions in bold-print type in the agreement. Plaintiff Brown does not show evidence that she objected to these terms or that the defendants required her to accept these terms without question.

When Plaintiff Stout purchased a 1992 Chevrolet Camaro on May 26, 1998, he signed a similar agreement.

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Stout signed a form captioned "Dispute Resolution Agreement" that states in part:

> With the exception described below, in the event of a dispute(s) under the terms of the Contract(s), the parties will submit such dispute(s) for resolution by binding arbitration instead of submitting disputes to a court or jury. For example, this applies to all disputes brought under state or federal consumer protection and lending laws. Arbitration will be according to the arbitration rules of the *American Arbitration Association*.
>
> THE PARTIES AGREE THAT THE ONLY CLAIMS NOT SUBJECT TO THIS AGREEMENT ARE: 1) A CLAIM BY EITHER PARTY SEEKING TOTAL DAMAGES UNDER $10,000; AND 2) CLAIMS RELATING TO REPOSSESSION OR REPLEVIN OF THE VEHICLE.
>
> Purchaser, Dealer, and all assignees shall each pay their own expenses, including attorneys' fees, and shall bear equally the fees and expenses of the arbitrator. Judgment upon any arbitrator's award may be entered by any court having competent jurisdiction.

* * *

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> BY SIGNING BELOW, ALL PARTIES ACKNOWLEDGE THAT THEY HAVE READ THIS DISPUTE RESOLUTION AGREEMENT AND THAT THEY AGREE TO ITS TERMS AND CONDITIONS.

Dispute Resolution Agreement, dated May 26, 1998 (emphasis added).

After reviewing these agreements and the videotape evidence of these transactions, the Court finds that Plaintiffs Stout and Brown voluntarily and expressly agreed to arbitrate any claims.

The Court next considers the scope of these agreements and whether Congress intended the Federal Arbitration Act to govern the plaintiffs' claims. Under the Act, "any doubts concerning the scope of arbitrability should be resolved in favor of arbitration." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25-6 (1991); *McGinnis v. E.F. Hutton & Co., Inc.*, 812 F.2d 1011, 1013 (6th Cir.), *cert. denied*, 484 U.S. 824 (1987).

The scope of the contracts at issue favors arbitration. First, the arbitration agreements the plaintiffs signed are broad. The contracts require the plaintiffs to arbitrate all disputes "under the terms of the 'Contracts.' " To the extent the plaintiffs dispute issues that relate to the purchase of their vehicles (e.g., payments, financing, or the warranty agreements), such matters are arbitrable.

Second, all of the plaintiffs' claims against the defendants arise "under the contracts" and are subject to arbitration. In their First Amended Complaint, the plaintiffs make claim for fraud, violations of Ohio's Consumer Sales Practices Act, and violations of the federal Truth-in-Lending Act. These claims clearly fall within the scope of the Federal Arbitration Act. Claims arising under the Truth-in-Lending Act, 15 U.S.C. 1640(e), presumptively involve interstate commerce. *Prima Paint Corp.*, 388 U.S. at 401; *McCarthy v. Providential Corp.*, No. C 94-0627, 1994 WL 387852, *2 (N.D. Cal. July 19, 1994), *appeal dismissed*, 122 F.3d 1242 (9th Cir. 1997), *cert. denied*, 199 S. Ct. 275 (1998). This presumption is satisfied here since the plaintiffs' contracts are for the purchase of motor vehicles — transactions involving interstate commerce. Because the plaintiffs' state law claims arise from the same transactions, these claims also fall within the scope of the Act. 9 U.S.C. § 2.

Having decided this, the Court next considers whether Plaintiffs Stout and Brown show sufficient evidence of fraud in the inducement to defeat arbitration.

Where a plaintiff challenges the making of the arbitration agreement itself, as opposed to the terms of the contract as a whole, federal courts may rule on the merits of the claim. *Prima Paint Corp.*, 388 U.S. at 404. In doing so, the court applies state law principles governing the formation of contracts. *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 475-76 (1989); *Ferro*, 142 F.3d at 934.

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Plaintiff Stout and Brown allege the defendants fraudulently induced their assent to arbitration. Plaintiffs say the defendants presented the agreements but failed to fully explain that arbitration abrogated the plaintiffs' legal rights to bring claims in state court. Arguing the agreements are unenforceable adhesion contracts, plaintiffs rely on the Ohio Supreme's Court's 1998 decision in *Williams v. Aetna Financial Company*, 83 Ohio St.3d 464 (1998), *cert. denied*, __ U.S. __, 119 S. Ct. 1357 (1999). Plaintiffs suggest the *Williams* case stops this Court from finding the arbitration agreements enforceable. The Court disagrees.

In *Williams*, the Ohio Supreme Court reviewed an arbitration clause contained in a consumer credit agreement between a plaintiff home buyer and Aetna, a home equity lender. The borrower, Mildred Williams, signed a loan agreement contract to have work done on her home. The loan agreement effectively was a second mortgage on her home and included an arbitration clause requiring Williams to arbitrate any disputes outside the courts.

Considering whether the agreement between Aetna and Williams was enforceable, the Ohio Supreme Court found the arbitration clause to be unconscionable. Although the court recognized the strong presumption in federal and state law favoring arbitration agreements, the court decided this presumption was overcome by evidence of an egregious conspiracy to defraud the plaintiff:

> We determine that any presumption in favor of arbitration was overcome based on the entire record of this case. Furthermore, we believe that

> the presumption in favor of arbitration should be substantially weaker in a case such as this, when there are strong indications that the contract at issue is an adhesion contract, and the arbitration clause itself appears to be adhesive in nature. In this situation, there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration.

Id. at 473.[6]

Although the *Williams* decision is noteworthy considering the plaintiffs' claims for fraudulent inducement, the decision does not control here. First, the Federal Arbitration Act governs the instant case. In *Williams*, the Ohio Supreme Court construed a court's obligation to compel arbitration under Ohio Revised Code § 2711.01, Ohio's arbitration statute. This obligation is not present here.

Second, to the extent the Federal Arbitration Act requires federal courts to consider issues of state contract law, this Court applies and is guided by the federal policy favoring arbitration. *Moses*, 460 U.S. at 24. Further, even considering the well-articulated principles of unconscionability stated in *Williams*, this Court does not find the agreements here to be unenforceable adhesion contracts.

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6. The *Williams* court stated that the arbitration clause contained in Williams' consumer contract "necessarily engendered more reservations regarding its enforceability under principles of equity than an arbitration clause in a different setting. . . ." *Id.* at 472.

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In Ohio, a plaintiff sufficiently states a claim that an arbitration agreement is unconscionable or takes the form of an adhesion contract by showing that (1) the contract terms are one-sided or unreasonably favorable to the other party, (2) that disparity between the parties' bargaining power denies the less advantaged party meaningful choice in accepting the terms of the contract, and (3) the less advantaged party cannot obtain their "desired product or services except by acquiescing in form contract." *See Williams*, 83 Ohio St.3d at 482 (Cook, J., dissenting); *Sekeres v. Arbaugh*, 31 Ohio St.3d 24, 31 (1987) (H. Brown, dissenting) (quoting Black's Law Dictionary at 38, defining "adhesion contract" (5th ed. 1979)).[7]

Here, the Court finds the arbitration provisions are not so one-sided as to be unconscionable. Both agreements call for submission to legitimate resolution panels. No evidence supports a claim that the Better Business Bureau or the American Arbitration Association would not be able to fairly adjudicate plaintiffs' claims. Plaintiff Stout's agreement provides that each party is to bear their own costs. These provisions are conscionable.

Plaintiffs do not show the defendants denied opportunity to object or question the terms of the arbitration agreements.

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7. *See Standard Oil Co. of Cal. v. Perkins*, 347 F.2d 379, 383 n.5 (9th Cir. 1965) (" 'Adhesion contract' is a handy shorthand descriptive of standard form printed contracts prepared by one party and submitted to the other on a 'take it or leave it' basis. The law has recognized there is often no true equality of bargaining power in such contracts and has accommodated that reality in construing them.") (historical citations omitted).

Plaintiffs concede they could ask questions if they did not understand the agreements. Nor do the plaintiffs show that the defendants' would have refused to sell the vehicles had the plaintiffs decided not to sign the agreements. Also, these contracts involved the purchase of used vehicles of a kind that are widely available from a huge number of sellers if Stout or Brown found the arbitration provision unacceptable. Neither Stout nor Brown challenged the contract at the time they signed it, despite having opportunity to do so.[8]

Here, the defendants properly rely on the contract language and the strong presumption under federal law favoring arbitration. Applying federal law to these facts favors arbitration.

The Federal Arbitration Act requires courts to "rigorously enforce agreements to arbitrate." *Shearson/ American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *Dean Witter*, 470 U.S. at 221. The Act "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration

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8. *See Ferro*, stating:

> In determining the validity of an arbitration agreement contained in a contract subject to the FAA, the Supreme Court has held that once a court determines that the agreement to arbitrate has not been fraudulently induced all other issues falling within that agreement are to be sent to arbitration.

142 F.3d at 933.

agreement has been signed." *Id.* at 218 (citing §§ 3 and 4 of the Act) (emphasis added).

The mandatory provisions of the Federal Arbitration Act do not permit parties to an arbitration agreement "to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate." *Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984).

As earlier discussed, neither Brown or Stout give sufficient evidence that the defendants fraudulently induced them to sign the arbitration agreements. Plaintiffs Stout and Brown say they each read the respective agreement before signing it. Defendants also offered the plaintiffs an opportunity to ask questions. Furthermore, the contract language was clear and unambiguous. The defendants presented the arbitration agreements to the plaintiffs on a separate form. The contract terms were not hidden in boilerplate language or otherwise disguised.[9]

Taken together, the facts of this case favor enforcing the arbitration agreements.

III. Conclusion

Having reviewed the facts of this case, the Court concludes the plaintiffs agreed to arbitrate their claims before non-judicial tribunals. The court further finds that the

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9. See Exhibits 5 and 6 to Plaintiffs' Response Brief to Defendants' Motion to Compel.

plaintiffs do not give sufficient evidence that the defendants fraudulently induced their assent to the arbitration agreements. Accordingly, the Court grants the defendants' motion to compel arbitration. 9 U.S.C. § 4.

As arbitration will resolve the issues in suit, the Court denies that part of the defendants' motion seeking to stay this case. The Court dismisses this case without prejudice to reinstatement should further proceedings be needed after arbitration. The parties shall proceed to arbitration before the Better Business Bureau or the American Arbitration Association, respectively, and shall comply with the terms of the agreements.

IT IS SO ORDERED.

Dated: June 9, 1999

s/ James S. Gwin
Judge James S. Gwin
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION DATED AND FILED JUNE 7, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 5:98-CV-2830
Judge James S. Gwin

JAMES D. STOUT, et al.,

Plaintiffs,

v.

J.D. BYRIDER, et al.,

Defendants.

ORDER

In this action, Plaintiffs James D. Stout and Shirley A. Brown make claim for fraud, violations of Ohio's Consumer Sales Practices Act, and the federal Truth-in-Lending Act arising from the plaintiffs' purchase of used motor vehicles. On April 6, 1999, the plaintiffs moved this Court to certify this case as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure [Doc 29]. Plaintiffs seek a class described as:

> All consumers who purchased an automobile from the defendant, J.D. Byrider aka Docherty Motors,

that was financed through the defendant, T. & J. Acceptance Corporation dba CarNow Acceptance Company, in the State of Ohio at any time from 1993 through the present.

Defendants oppose certification of the proposed class arguing that there is insufficient commonality among the class, that plaintiffs' claims are not typical of the class, and that the plaintiffs will not adequately represent the class. Because the Court finds that the plaintiffs' claims are not typical of the class and because the Court finds insufficient commonality among the class, the Court denies the motion to certify this as a class action, for the reasons that follow.

I. Factual background

In 1998, Plaintiffs James D. Stout and Shirley Brown purchased used automobiles from Docherty Motors in Sandusky, Ohio. They obtained financing to purchase the cars from Defendant CarNow Acceptance Corporation ("CNAC").

Stout and Brown bought different vehicles of different age and mileage, for different prices, and from different salesmen. Both Stout and Brown purchased extended warranty service agreements.

Plaintiffs Stout and Brown say the vehicles they purchased from Defendant Byrider were defective. Stout and Brown claim they purchased expensive warranties without

knowledge that these warranty charges were included in the finance charges. The plaintiffs say the defendants have engaged in a standard practice of uniformly misrepresenting the quality and value of the vehicles they sell and the cost and value of a warranty.

Considering these facts, the Court decides whether this cause is suitable for class certification under Federal Rule 23.

II. Discussion

Plaintiffs Stout and Brown say this case is suitable for class treatment because the defendants have engaged in a systematic practice of defrauding many used car buyers. Plaintiffs say the underlying proof of their claims and the claims of the prospective class arises from the same scheme of deceptive conduct. Stout and Brown urge that class treatment is the most effective way of obtaining relief under these facts.

Federal Rule of Civil Procedure 23 governs class action lawsuits. A court may certify a case as a class action if all the procedural requirements of Rule 23(a) are met, and if certification is appropriate under Rule 23(b)(1), (b)(2) or (b)(3).[1] The party seeking class certification bears the burden of proof. *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982); *In re American Med. Sys., Inc.*,

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1. Rule 23(a) provides the procedural requirements for class certification. Rule 23(b) provides additional requirements for maintaining a class.

75 F.3d 1069, 1079 (6th Cir. 1996). The United States Supreme Court requires district courts to conduct a "rigorous analysis" into whether the prerequisites of Rule 23 are met before certifying a class. *Falcon*, 457 U.S. at 161.[2]

The Sixth Circuit has adopted this mandate. *See Sprague v. General Motors Corp.*, 133 F.3d 388, 397 (6th Cir.), *cert. denied*, __ U.S. __, 118 S. Ct. 2312 (1998). In *Sprague*, the Sixth Circuit stated that "a district court may not certify any class without 'rigorous analysis' of the requirements of Rule 23." *Id.* (quoting *Falcon*, 457 U.S. at 161).

Here, Plaintiffs Stout and Brown say they satisfy the prerequisites of Rule 23(a), and that certification under Rule 23(b)(2) or (b)(3) is appropriate. The Court first decides if the plaintiffs satisfy the requirements of Rule 23(a).

A. Rule 23(a)

Rule 23(a) sets forth the following four prerequisites to class certification: (1) the class must be so numerous that "joinder of all members is impracticable"; (2) there must be "questions of law or fact common to the class"; (3) the claims of the representative party must be "typical" of those of the class; and (4) the representative party must "fairly and adequately protect the interests of the class." Fed. R.

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2. *See also In re American Med Sys., Inc.*, 75 F.3d at 1078-79; *Kutschbach v. Davies*, 885 F. Supp. 1079 (S.D. Ohio 1995) (proposed class representative must establish that all requirements for certification of class are satisfied with respect to putative class for certification to be proper); *Jacksaw Pontiac, Inc. v. Cleveland Press Pub. Co.*, 102 F.D.R. 183, 196 (S.D. Ohio 1984).

Civ. P. 23(a). The commonality, typicality, and adequacy-of-representation requirements are related. Each requires a judge to consider whether the claims of the named plaintiff are sufficiently similar to the claims of the absent class members to make the plaintiff an adequate representative of the proposed class's interests. *See Falcon*, 457 U.S. at 157-58 n.13.

Here, Plaintiffs Stout and Brown fail to satisfy at least two of the four requirements; their claims are not typical of the class under Rule 23(a)(3), and the plaintiffs are not adequate representatives of the proposed class under 23(a)(4).

Under Fed. R. Civ. P. 23(a)(3), a plaintiff seeking class certification must show that his or her claims are typical of other potential class claims. Rule 23(a)(3) exists to ensure that the claims of the representative party are similar enough to the claims of the class so that the representative adequately will represent all members of the class. *See Hiatt v. County of Adams, Ohio*, 155 F.R.D. 605, 609 (S.D. Ohio 1994) (any inquiry into typicality under Rule 23(a)(3) requires a comparison of the claims or defenses of the representative with the claims or defenses of the class).

The United States Supreme Court repeatedly has held that "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *Falcon*, 457 U.S. at 156 (citing *East Texas Motor Freight System, Inc.*, 431 U.S. at 403.[3] In *Sprague*,

3. *See also Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974) (to have standing to sue as a class (Cont'd)

the Sixth Circuit described the typicality requirement as follows:

> Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct. . . . A necessary consequence of the typicality requirement is that the representative's interests will be aligned with those of the represented group, and in pursuing his own claims, the named plaintiff will also advance the interests of the class members.

Id. at 399 (citing 1 Herbert B. Newberg & Alba Conte, 1 Newberg on Class Actions § 3-13, at 3-75 (3d ed. 1992) (internal quotations omitted)). The Sixth Circuit summarized the premise of the legal standard simply: "as goes the claim of the named plaintiff, so go the claims of the class." *Sprague*, 133 F.3d at 399.

Here, Plaintiffs Stout and Brown fail to show a sufficient relationship between the plaintiffs' experiences and the diversity of experiences of putative class members. For

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(Cont'd)
representative, it is essential that plaintiff be a party of that class which means he must possess the same interest and suffer the same injury shared by all members of class he represents); *Senter*, 532 F.2d at 523-24 (to be typical, a representative's claim need not always involve the same facts or law provided there is a common element of fact or law).

example, Plaintiffs Stout and Brown had differing difficulties with their vehicles and each received different responses to their requests for repairs. Plaintiff Stout alleges his car frame had been damaged. The vehicle Stout purchased was a 1992 Chevrolet Camaro that had over 91,000 miles. By contrast, Brown alleges her car routinely needed repairs. Brown purchased a different model vehicle with less than 49,000 miles.

Plaintiffs Stout and Brown also purchased their vehicles at different prices and for different purposes. Stout purchased his car for his personal use. Brown purchased her vehicle for her sixteen-year-old daughter. The plaintiffs' cars also had different prior owners and each car has a unique history of use and care.

Moreover, Plaintiffs Stout and Brown and the other proposed class members purchased their respective cars under different circumstances. The plaintiffs engaged in separate transactions with the defendants, and each had different financing and lending needs. Each plaintiff also had a different individual understanding of the terms and conditions of their purchase agreements. Each plaintiffs' level of expertise and experience in buying vehicles varies. These factors show that the plaintiffs' dealings with the defendants are not "typical" to each other, nor typical of prospective absent class members.

Also, each plaintiff appears to have allegedly suffered different injury. Among the plaintiffs, the extent of the alleged injury varies in degree. In this regard, the adequate remedy for each plaintiff will likely differ. Some plaintiffs

may not claim any problems with their vehicles, while others may receive refunds or repairs and be satisfied. Simply because one plaintiff may prove he or she was injured, it cannot be said that another plaintiff alleging different harm arising from a separate transaction will be able to prove their case.

The substantial differences among putative class members described above militate against a finding of typicality. Accordingly, the Court finds the plaintiffs fail to satisfy the requirements of Rule 23(a)(3).

B. Rule 23(a)(4).

Under Rule 23(a)(4), a plaintiff seeking to represent the class must show that he or she will fairly and adequately represent and protect the interests of the class. *In re American Med. Sys., Inc.*, 75 F.3d at 1083. This requirement is "essential to due process, because a final judgment in a class action is binding on all class members." *Id.* (citing *Hansberry v. Lee*, 311 U.S. 32 (1940)).

Adequacy of class representation is initially measured by two standards. First, class counsel must be qualified, experienced and generally able to conduct the litigation. Second, class members must not have interests that are antagonistic to one another. *Id.* (citing *Senter*, 532 F.2d at 525).[4] The Court evaluates each of the standards.

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4. *See also Alexander Grant & Co.*, 116 F.R.D. at 588-89 (stating "[t]here are typically three factors that make up the common

(Cont'd)

First, the plaintiffs are represented by a law firm and individual attorneys with broad experience in class action suits, complex litigation, and personal injury and commercial claims. The law firm and attorneys are well qualified to represent the class. Accordingly, the plaintiffs satisfy the first prong for adequate representation.

The second prong of Rule 23(a)(4) requires the Court to decide whether Plaintiffs Stout and Brown, the named plaintiffs, have interests that are antagonistic to the proposed class members. Interests are antagonistic when there is evidence that the representative plaintiffs appear unable to "vigorously prosecute the interests of the class." *In re American Med. Sys.*, 75 F.3d at 1083. Inability to prosecute the class's interest may arise due to a conflict of interest with other members of the class. *Id.* A representative plaintiff also should have a stake in the outcome of the litigation and should be familiar with the facts of the case. *Alexander Grant & Co.*, 116 F.R.D. at 589 (citations omitted).

Here, the Court finds the plaintiffs' interests in the case conflict with the interest of other potential class members.

(Cont'd)
interest determination in the first step: is the representative a class member, does the representative have a stake in the outcome, and is the representative familiar with the facts and conditions to be challenged."); *Jackshaw Pontiac, Inc.*, 102 F.R.D. at 191 (stating that "[I]n making the determination of adequacy of representation, the District Court should consider the experience and ability of counsel for the plaintiffs and whether there is any antagonism between the interests of the plaintiffs and other members of the class they seek to represent") (quoting *Cross v. National Trust Life Ins. Co.*, 553 F.2d 1026, 1031 (6th Cir. 1977)).

Appendix C

First, the record shows that Plaintiff Stout already has filed and voluntarily dismissed a separate individual action in state court against these defendants. In this regard, he has preserved his right to pursue that suit should this Court dismiss this case or deny class certification.

In addition, the named plaintiffs obtained repairs or alternatives from the defendants that differ from other class members. As indicated, Plaintiff Stout complains that the 1992 Chevrolet Camaro he purchased had a bent frame. Defendants have offered to fully refund Stout for the purchase of his vehicle. With regard to Plaintiff Brown, defendants have answered her complaints and made repairs covered by her contract. The named plaintiffs have arguably received treatment better than class members. Because defenses and mitigation can be used against the named plaintiffs, they are not adequate representatives of the class.

Also, because the named plaintiffs' claims arise from different transactions and injury, absent class members, perhaps who alleged greater harm, may lose the benefit of having the facts of their separate cases adequately presented. This scenario sufficiently shows that the named plaintiffs may not share the same degree of interest for the claims of other class members.

Because Plaintiffs Stout and Brown fail to satisfy the second prong for adequate representation under Rule 23(a)(4), class action status is not appropriate.

Appendix C

C. Rule 23(b)(3)

The Court next finds the plaintiffs fail to meet the requirements of Rule 23(b)(3). The principal purpose of a class action is to achieve real efficiency and judicial economy. *General Tel. Co.*, 457 U.S. at 159. The requirement that "common" issues predominate over individual issues assures that the goal of judicial economy is served in fact, not just in theory. *In re American Med Sys.*, 765 F.3d at 1085.

To decide whether common issues predominate, this Court need first examine the nature of the plaintiffs' claims and the proof that would be required at trial to support those claims.

Here, a core issue exists whether individual class members of Defendant Byrider relied upon representations or failures to disclose and, if so, what damages proximately resulted.[5] Federal courts have repeatedly held that issues of knowledge and reliance require individual proofs which limit class-wide treatment of fraud-based claims. *See e.g., Andrews v. American Tel. & Tel. Co.*, 95 F.3d 1014, 1025, *reh'g denied*, 104 F.3d 373 (11th Cir. 1996); *Castano v. American Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996) ("[A] fraud class action cannot be certified when individual reliance will be an issue.").

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5. *See e.g., Burr v. Board of County Comm'rs of Stark County*, 23 Ohio St.3d 69, 73 (1986) (reliance an element of fraud claim); *Black v. Cosentino*, 117 Ohio. App.3d 40, 44 (9th Dist. Dec. 26, 1996) (reliance an element of concealment claim).

Appendix C

Because reliance issues so permeate the plaintiffs' claims, they shut the door on predominance of alleged "common" issues and preclude class certification. *See Andrews*, 95 F.3d at 1023-24; *Mack v. GMAC*, 169 F.R.D. 671, 680 (M.D. Ala. 1996) (denying class certification because reliance issues necessitated by plaintiffs RICO claims made a class action "a managerial nightmare").[6]

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6. Alternatively, Plaintiffs Stout and Brown argue this case should be certified under Fed. R. Civ. P. Rule 23(b)(2). Rule 23(b)(2) provides a class is maintainable if "the party opposing the class action has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." *Id.* Rule 23(b)(2) was designed to reach situations where a plaintiff seeks equitable relief. However, the rule generally is not applied where a plaintiff seeks money damages, or where "the appropriate final relief relates exclusively ro predominately to money damages." Fed. R. Civ. P. 23(b)(2), Notes to 1966 Amendment.

Here, the plaintiffs argue the defendants have acted in a manner generally applicable to all prospective class members. Although the plaintiffs do make claim for equitable relief, the First Amended Complaint shows the plaintiffs principally seek money damages. For example, in Count 2, the plaintiffs seek actual damages for alleged violations of the Truth-in-Lending Act. In Count 3, the plaintiffs seek damages for alleged violations of Ohio's Consumer Sales Practices Act. In Count 4, they seek punitive damages on their fraud claims.

Because the plaintiffs sue principally for money damages, the Court denies the motion for certification under Rule 23(b)(2). *See Peters v. Cars to Go, Inc.*, 184 F.R.D. 270, 279 (W.D. Mich. 1998) ("While Plaintiffs do seek declaratory relief in addition to damages, the requested declaratory relief is only incidental to damages, the primary relief sought in this case. Thus, the putative classes cannot be certified under Rule 23(b)(2).").

Appendix C

III. Conclusion

For the reasons above, the Court finds that Plaintiffs Stout and Brown fail to satisfy the prerequisites for class certification under Rule 23(a)(3) and (4). The Court also finds that the plaintiffs fail to meet the requirements to maintain a class action under Rule 23(b)(3). Accordingly, the Court denies the plaintiffs' motion for class certification [Doc. 29].

IT IS SO ORDERED.

s/ James S. Gwin
James S. Gwin
United States District Judge

APPENDIX D — AGREEMENT FOR BINDING ARBITRATION BETWEEN DOCHERTY MOTORS INC. AND SHIRLEY A. BROWN DATED JANUARY 31, 1998

BETTER BUSINESS BUREAU PLEDGED TO ARBITRATE

Agreement for Binding Arbitration

In connection with the Retail Installment Contract and Security Agreement, and all related agreements or promises having anything to do with the purchase of the vehicle described below (hereinafter collectively referred to as the "Contracts"), Docherty Motors Inc. (the "Dealer") and the undersigned purchaser(s) (the "Purchaser(s)") hereby agree as follows:

Except as described below, in the event of a dispute under the terms of the Contracts, the Dealer and the Purchaser(s) hereby agree to submit such dispute to the Better Business Bureau for resolution by binding arbitration according to the rules of the Better Business Bureau.

THE PARTIES HEREBY FURTHER AGREE THAT THE ONLY CLAIM NOT SUBJECT TO THIS AGREEMENT IS A CLAIM BY THE DEALER THAT PURCHASER(S) HAVE FAILED TO MAKE PAYMENTS ON A TIMELY BASIS IN COMPLIANCE WITH THE CONTRACTS, SUCH A CLAIM MAY BE PURSUED IN A COURT OF LAW.

Appendix D

DATE: JAN 31, 1998

VEHICLE YEAR, MAKE, AND MODEL:
91 FORD FESTIVA

VEHICLE IDENTIFICATION: KNJPT06H5M6120203

DEALER:	PURCHASER(S)
DOCHERTY MOTORS INC.	s/ Shirley A. Brown BY SHIRLEY A. BROWN
BY: s/ [illegible] (MANAGER)	(PRINT NAME)

APPENDIX E — DISPUTE RESOLUTION AGREEMENT BETWEEN DOCHERTY MOTORS, INC. AND JAMES D. STOUT DATED MAY 26, 1998

Dispute Resolution Agreement

In connection with the Retail Installment and Security Agreement and all related agreements or promises having anything to do with the purchase of the vehicle described below (referred to jointly as the "Contract"), the Dealer, Purchaser(s) and all assignees agree as follows:

With the exception described below, in the event of a dispute(s) under the terms of the Contract(s), the parties will submit such dispute(s) for resolution by binding arbitration instead of submitting disputes to a court or jury. For example, this applies to all disputes brought under state or federal consumer protection and lending laws. Arbitration will be according to the arbitration rules of the American Arbitration Association.

THE PARTIES AGREE THAT THE ONLY CLAIMS NOT SUBJECT TO THIS AGREEMENT ARE: 1) A CLAIM BY EITHER PARTY SEEKING TOTAL DAMAGES UNDER $10,000; AND 2) CLAIMS RELATING TO REPOSSESSION OR REPLEVIN OF THE VEHICLE.

Purchaser, Dealer, and all assignees shall each pay their own expenses, including attorneys' fees, and shall bear equally the fees and expenses of the arbitrator. Judgment upon any arbitrator's award may be entered by any court having competent jurisdiction.

Appendix E

No class action arbitration may be ordered under this provision, and there shall be no joinder of parties. To the extent permitted by law, the arbitrator(s) shall have no authority to award punitive damages in any dispute.

The parties agree that the vehicle purchase involves interstate commerce and that this Dispute Resolution Agreement shall be governed by the Federal Arbitration Act, 9 U.S.C. Sections 1-16, as amended.

BY SIGNING BELOW, ALL PARTIES ACKNOWLEDGE THAT THEY HAVE READ THIS DISPUTE RESOLUTION AGREEMENT AND THAT THEY AGREE TO ITS TERMS AND CONDITIONS.

DATE: May 26, 1998

VEHICLE YEAR, MAKE, & MODEL:
92 CHEVROLET CAMARO (TEAL)

VEHICLE IDENTIFICATION: 1G1FP23TXNL153452

DEALER: PURCHASER(S)
DOCHERTY MOTORS, INC.

BY: s/ [illegible] BY s/ James D. Stout

AGREED TO BY ASSIGNEE CNAC

BY: s/ [illegible]